CASE NO. A-19-1110

IN THE NEBRASKA COURT OF APPEALS

TRACY GANDARA-MOORE,

Plaintiff-Appellant,

vs.

MICHAEL MOORE, JR.,

Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA
The Honorable Susan I. Strong, District Judge

BRIEF OF APPELLEE

PREPARED AND SUBMITTED BY:

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STATEMENT OF BASIS OF APPELLATE JURISDICTION

Appellee ("Mr. Moore") agrees that this Court has jurisdiction to review the Decree of Dissolution of Marriage (the "Decree") pursuant to NEB. REV. STAT. § 25-1911 and § 25-1912 (Reissue 2016), since a final order was entered by the District Court of Lancaster County, Nebraska on October 25, 2019 and Appellant filed a notice of appeal and deposited the relevant docket fee on November 22, 2019. (T46-63)

STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal from a marital dissolution action, which included a contempt proceeding regarding various temporary orders that were not complied with during the pendency of the action. A number of issues were addressed by the trial court, but only those relevant to this appeal are discussed herein.

2. Issues Tried to the Court Below.

   (a) Custody, parenting time and parenting plan;

   (b) Child support and deviation for travel expenses;

   (c) Valuation and division of the marital estate;

   (d) Order to show cause; and

   (e) Attorney fees.

3. Judgment of the District Court.

   (a) The trial court denied Mr. Moore's request for joint legal custody, but approved his request for parenting time and adopted his proposed parenting plan;

(b) The trial court denied Appellant's request to determine child support based on her current income of $400 per week in unemployment benefits, finding such a child support calculation would be inequitable, and adopted Mr. Moore's proposed child support calculation without any deviation for his travel expenses;

(c) The trial court found that Appellant's account of the marital debts double-counted several debts and that Mr. Moore's account of the marital estate, which included a credit for one-half of his inheritance that was dissipated by Appellant, to be more accurate and adopted his proposed division of the marital assets and debts;

(d) The trial court found Appellant in contempt for refusing to facilitate the Facetime parenting time as ordered and awarded Mr. Moore one-half of his attorney's fees and costs related to the contempt action ($2,500); and

(e) The trial court declined to award either party attorney fees associated with the dissolution action.

4. Standard of Review.

In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id*. In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Id*. However, when evidence is in conflict, the appellate court

considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Thompson v. Thompson*, 24 Neb. App. 349, 354, 887 N.W.2d 52, 57 (2016). A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).

In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *Krejci v. Krejci*, 304 Neb. 302, 934 N.W.2d 179 (2019).

A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion. *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

PROPOSITIONS OF LAW

I.

In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).

II.

In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

III.

Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Thompson v. Thompson*, 24 Neb. App. 349, 354, 887 N.W.2d 52, 57 (2016).

IV.

A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).

V.

In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *Krejci v. Krejci*, 304 Neb. 302, 934 N.W.2d 179 (2019).

VI.

A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion. *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

VII.

In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the following:

(a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child;

(d) Credible evidence of abuse inflicted on any family or household member ...; and

(e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

NEB. REV. STAT. § 43-2923(6) (Reissue 2016); *Wolter v. Fortuna*, 27 Neb. App. 166, 182, 928 N.W.2d 416, 428-29 (2019).

VIII.

In the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party. *See,* NEB. REV. STAT. § 25-1127 (Reissue 2016); *Schroeder v. Schroeder*, 26 Neb. App. 227, 918 N.W.2d 323 (2018).

IX.

In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Facilities Cost Mgmt. Group v. Otoe Cnty. Sch. Dist.,* 298 Neb. 777, 792, 906 N.W.2d 1, 13 (2018).

X.

A trial court's ruling on a discovery sanction will not be disturbed on appeal absent an abuse of discretion. The determination of the appropriate sanction is to be considered in the factual context of the particular case. When determining what sanction is appropriate, a trial court should consider the explanation for the failure to comply, the importance of the expert's testimony, the surprise to the opposing party, any time needed to prepare to meet the testimony from the expert, and the possibility of a continuance. *Id.*

XI.

Sanction of exclusion, when party's failure to abide by rules of discovery results in other party's detriment, is not mandatory. *Brown v. Hansen*, 1 Neb. App. 962, 510 N.W.2d 473 (1993).

XII.

Earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where evidence is presented that the parent is

capable of realizing such capacity through reasonable effort. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004).

XIII.

In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

STATEMENT OF FACTS

The parties were married on March 17, 2012 in Lincoln, Lancaster County, Nebraska. (T1) Two children were born of the marriage, namely, Santana M. Moore, born in 2012, and Arianna M. Moore, born in 2014. (T2)

After the birth of Arianna, Mr. Moore took several part-time jobs with evening and weekend hours so he could stay home and care for the children during the day while Appellant worked full-time outside of the home. (145:2-14; 226:14-25; 354:3-6) Mr. Moore was the primary caregiver of the minor children until the parties separated in July of 2017, following a heated argument that ultimately led to Mr. Moore being convicted of third-degree domestic assault. (12:6-7; 19:3-6; 271:22-273:5; E28) Mr. Moore eventually learned that Appellant had also sought and was granted a protection order following this incident and filed for divorce. (254:17-255:7; E6; T1) Following the parties' separation, Mr. Moore did "the hardest thing [he] had to do" and moved back to his home on the east coast to live with his mother. (217:18-24; 356:11-358:9)

At trial, the parties agreed physical custody should be awarded to Appellant; Mr. Moore reasoned that the minor children should remain in Lincoln, Nebraska, with their mother. (326:3-12) However, parenting time was hotly contested. Mr. Moore simply requested some amount of parenting time after Appellant had denied him any significant parenting time in the two years preceding trial. (E25; 311:13-18) Appellant did not offer any parenting plan or set schedule for parenting time and instead requested that all parenting time be "therapeutic", which she defined as Mr. Moore "claim[ing] responsibility for his actions" and "process therapeutically with [their] children what happened". (151:23-152:4; 207:5-14)

At the time of trial, the parties' children were seven and five years old and had not had any significant parenting time with their father since they were five and three years old due to Appellant setting a continuously moving target for Mr. Moore to meet in order to exercise his parenting time. First, Appellant argued that Mr. Moore was a flight risk and could not have parenting time with his daughters because he would take them back to his home in Virginia. (154:7-25) Then, she said all parenting time needs to be "therapeutic" and disregarded this Court's orders for any telephonic parenting time and in-person parenting time that was not "therapeutic". (151:23-152:4; 207:5-14) Mr. Moore voluntarily underwent a diagnostic evaluation with Dr. Rick McNeese to address Appellant's concerns with his parenting time and also attempted to schedule a therapeutic session with Dr. McNeese and the children. (269:16-271:10) However, the therapeutic session was never completed, because Appellant claimed she had no notice of any scheduled time or date. (152:5-154:6) This moving target, along with Appellant's threats to change the children's last names from Moore to Gandara, shows that Appellant was motivated to inappropriately limit Mr. Moore's parenting time and alienate him from the children. (E24,11; 224:12-225:11)

During the pendency of the proceedings, Mr. Moore had been granted telephonic and Facetime parenting time to be exercised twice week. (T16; T65-67) However, Mr. Moore testified to not having any Facetime parenting time since there was a no-contact order entered in relation to his domestic assault criminal case, despite that no-contact order being modified twice to ensure he could exercise this parenting time. (311:13-18; 327:15-328:5; E28) When asked on cross-examination why she did not facilitate the parenting time as ordered, Appellant testified that any parenting time needed to be "therapeutic", even though it was not a requirement in any of the relevant court orders that the Facetime parenting time be therapeutic. (151:23-152:4; 171:21-172:9; 176:2-176:12) Mr. Moore filed a Verified Motion for an Order to Show Cause to enforce this Facetime parenting time, and an Order to Show Cause was issued and heard contemporaneously with trial. (T33-37; T49)

The trial court entered a Decree of Dissolution of Marriage on October 25, 2019, in which it dissolved the parties' marriage; awarded legal and physical custody of the minor children to Appellant; adopted Mr. Moore's proposed parenting plan which provided him limited parenting time of one weekend a month to be exercised in Lincoln, Nebraska; alternating Spring and Christmas breaks at his home on the east coast, and a total of four weeks in the summer to be exercised in two, nonconsecutive two-week periods; divided the parties marital assets and debts as proposed by Mr. Moore; calculated child support using Appellant's previous earning capacity rather than her present income while unemployed; and found Appellant in willful and contumacious violation of its previous orders for failing to facilitated Facetime parenting time. (T46-64)

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADOPTING THE PARENTING PLAN IN THE DECREE.

Appellant assigns error to the District Court in adopting a parenting plan that "was not reasonable nor in the children's best interests" and that "does not provide safety provisions for a victim of violent domestic partner abuse." (Brief of Appellant, p. 8) Specifically, Appellant contends that the trial court did not properly consider the relevant factors by (1) failing to address the domestic abuse by Mr. Moore on Appellant, (2) relying on a report authored by Dr. McNeese, (3) not relying on the opinion of Mr. Keady, (4) failing to consider Mr. Moore's contact with the children following his relocation, (5) failing to address the children's physical well-being, and (6) providing a "vague and ambiguous transition plan." (Brief of Appellant, p. 30-35) However, this characterization of the trial court's decision and reasoning is misleading and not supported by the record.

A. The District Court's Parenting Plan Adequately Provides for the Safety of Appellant in Conjunction with the Domestic Abuse Protection Order and Mr. Moore's Order of Probation

The District Court found that there was a domestic violence incident on July 16, 2017 that led to the parties' separation and noted that there was conflicting testimony on whether this was an isolated event and whether the incident culminated in physical abuse. (T48) Indeed, Appellant's testimony at trial was inconsistent with her previous statements and directly contradicted by her own experts' testimony. (132:6-133:14; E6; 21:11-21) Appellant claimed for the first time at trial that there were multiple incidents of physical abuse during the marriage, including some never disclosed before that were allegedly witnessed by the children. (18:10-14; 134:5-18) However, the children's counselor, who testified in Appellant's case-in-chief, did not mention the minor children ever being present for any alleged abuse and only knew of the one incident in 2017 that led to Mr.

Moore being charged with domestic assault, and Appellant never claimed in her previous affidavits or petitions for protection orders that the children witnessed anything incidents of abuse. (76:5-102:17; E6; E7; E33; E34) Furthermore, Appellant's testimony that there were multiple reports of abuse rather than one isolated event was directly contradicted by her own counselor's testimony. Appellant's counselor testified on cross-examination that there were no reported incidents of domestic violence as of May of 2017 when she conducted a clinic interview with Appellant. (74:17-20) In fact, Appellant's counselor did not begin treating Appellant for post-traumatic stress disorder until after the assault in July of 2017. (66:4-22) After reviewing this conflicting evidence, the trial court determined that Mr. Moore had assaulted Appellant on July 16, 2017, that the parties had a "combative relationship," and awarded the physical and legal care, custody and control of the parties' two minor children to Appellant with modest parenting time for Mr. Moore. (T48-49)

At the same time, the trial court affirmed the domestic abuse protection order in Lancaster County District Court Case No. CI 17-2577, which prohibits Mr. Moore from imposing any restraint upon the person or liberty of Appellant; threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of Appellant; and from possessing or purchasing a firearm. (T53; E6) Pursuant to the order, as amended by the Decree, Mr. Moore is also ordered to stay away from Appellant's residence and the children's school, except for the purposes of picking up and returning the minor children for his parenting time. (T53; E6) Furthermore, the probation order entered in Lancaster County Court Case No. CR 18-10865, which was offered and received into evidence at trial, provides that Mr. Moore is to have no contact with Appellant, except as authorized by order of the Lancaster County District Court, and that Mr. Moore is to attend and successfully complete a domestic abuse intervention program. (E38) With these protections in place, the parenting plan as ordered sufficiently protects Appellant by awarding limited parenting

time to Mr. Moore, reducing the amount of communication between the parties, and requiring Mr. Moore to give at least ten (10) days' notice in advance of his regular parenting time to be exercised in Nebraska. (T48-49, T57)

No additional limitations on Mr. Moore's parenting time were necessary as the evidence established that Mr. Moore's parenting time would not endanger the children. The evidence was undisputed that, after the birth of their second daughter in 2014, Mr. Moore was the primary caregiver for the children during the day while Appellant was the primary income-earner outside of the home. (145:2-14;226:19-25; 227:22-23) When asked on cross if there were any concerns she had with Mr. Moore's parenting ability before they separated, Appellant's only concern was that she speculated he had the children sit in front of the TV all day. (145:15-146:1) Appellant had also claimed at multiple times that Mr. Moore was a "flight risk" and had threatened to kidnap the minor children. (46:19-47:2; 154:15-155:6) However, Mr. Moore testified to voluntarily undergoing an evaluation to address these concerns and the evaluation by Dr. McNeese was received into evidence as Exhibit 26. (269:20-270:2; T48) Dr. McNeese's report and evaluation specifically found that Mr. Moore "has adequate anger control such that temper outbursts and domestic violence is unlikely." (E26,2). Further, the report noted that Mr. Moore shows "no evidence of major emotional disorder, thought disorder, personality disorder, or substance abuse disorder that can interfere with parenting." (E26,1). Thus, the trial court properly relied on Dr. McNeese's report to find Mr. Moore's requested parenting time did not pose a risk to the children, and, in adopting the parenting plan proposed by Mr. Moore with few alterations, the district court apparently found his testimony more credible. (T48-49; T56-61)

Appellant also argues the court erred by ordering a "vague and ambiguous transition plan" for failing to specify pick-up and drop-off times and locations, and contends that there

should be specific safety provisions to protect Appellant. (Brief for Appellant, p. 34) Under the circumstances, where the non-custodial parent lives out of state, it was reasonable for the trial court to provide the parties with flexibility for exchanging the children, particularly where there are other orders in place that necessarily complicate the process, i.e., the probation order and domestic abuse protection order. Indeed, Appellant's argument that the parenting plan is faulty for failing to protect Appellant from further abuse completely ignores the effect of these two orders. Mr. Moore has limited parenting time of one weekend a month; alternating Spring and Christmas breaks; and a total of four weeks in the summer. (T47-49; T56-58) He is also required to provide notice and specify the time and location of exchanges well in advance of exercising this parenting time. (*Id.*) This modest award of parenting time with flexibility in exchange times was well within the trial court's discretion and should not be disturbed on appeal.

B. The District Court Properly Considered the Relevant Factors in Determining the Best Interests of the Children in Its Custody and Parenting Time Determination.

In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the following:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
>
> (d) Credible evidence of abuse inflicted on any family or household member ...; and
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

NEB. REV. STAT. § 43-2923(6) (Reissue 2016); *Wolter v. Fortuna*, 27 Neb. App. 166, 182, 928 N.W.2d 416, 428-29 (2019), *review denied* (July 26, 2019).

Appellant assumes that, because the trial court did not specifically reference the testimony and report of the children's counselor, Michael Keady, that the court "relied solely on" the report authored by Dr. McNeese and "fail[ed] to take into account Mr. Keady's opinion regarding the children's current emotional wellbeing including the children's lack of attachment to [Mr. Moore]," among other things. (Brief for Appellant, p. 30-31) However, in the absence of a request by a party for specific findings, a trial court is not required to make detailed findings of fact and need only make its findings generally for the prevailing party. *See,* NEB. REV. STAT § 25-1127 (Reissue 2016); *Schroeder v. Schroeder*, 26 Neb. App. 227, 918 N.W.2d 323 (2018). Nonetheless, the trial court made specific findings regarding Mr. Moore's relationship with the children prior to the commencement of the proceedings and since the action was initiated:

> [Appellant] has been reluctant to allow [Mr. Moore] any visitation with the children since the beginning of this action. Since July of 2017, [Mr. Moore] has had a few Facetime conversations with his daughters and no in-person parenting time except for one 15-minute session with a therapist, Michael Keady, in August of 2018, during which [Appellant] was present with the children. (T49)

And, as explained in the previous section, the trial court made specific findings about the one incident of domestic abuse and apparently accepted Dr. McNeese's recommendations over Mr. Keady's in ordering parenting time.

Although not referenced in the Decree, Mr. Keady even conceded at trial that therapeutic parenting time is not always possible:

> The ideal treatment is for the family to work together and talk through what actually did and did not happen, and that there be some adult agreement about that, and that

> it be shared with the children. Of course, that's not always possible. So then it's a matter of just working with the children to identify, process and express their thoughts and feelings, and help them to best understand what has happened historically, and how to keep themselves safe. (86:12-20)

In this case, Mr. Moore testified to the efforts he had taken to exercise his parenting time, including the multiple trips to Nebraska and arrangements with both Dr. McNeese and Mr. Keady, and, as noted by the court at trial "that's not working." (250:18-254:16; 329:11-331:13; 345:3-348:21; 371:9) The trial court specifically noted that it had previously ordered Facetime parenting time to be administrated and Appellant refused to allow any parenting time that was not therapeutic. (T49) Therefore, it was well within the trial court's discretion to not require any therapeutic parenting time when Mr. Moore had effectively been denied any parenting time by Appellant's insistence that all parenting time be therapeutic. (151:23-24; 205:9-207:3; T49)

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED DR. MCNEESE TO TESTIFY AT TRIAL AND ADMITTED EXHIBIT 26 INTO EVIDENCE.

Appellant alleges that the trial court abused its discretion by allowing Dr. McNeese to testify without disclosure prior to trial, because it prejudiced Appellant and her ability to fully prepare for trial. (Brief for Appellant, p. 36) It is true that Mr. Moore's Pretrial Memorandum did not specifically list Dr. McNeese as a potential witness, and it did not specifically list Dr. McNeese's affidavit as a potential exhibit. (ST1-8) However, the Pretrial Memorandum did list "All witnesses necessary for foundation" and "All exhibits listed by Plaintiff", and the exhibits listed in Plaintiff's Pretrial Memo included "All pleadings, orders, exhibits and affidavits in the court-file for this case." (ST1,2) And, Dr. McNeese was called to lay the foundation for exactly one exhibit – the report attached to his affidavit that was originally submitted to the trial court and

Appellant's counsel in October 2018 – and was disclosed as soon as his availability for trial was known to Mr. Moore. (106:3-6; 107:4-17; 109:21-118:5) However, assuming this was a surprise disclosure for a trial that occurred over the course of three days in the span of five months, the district court did not abuse its discretion by permitting Dr. McNeese to testify and admitting Exhibit 26 into evidence.

In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Facilities Cost Mgmt. Group v. Otoe Cnty. Sch. Dist.,* 298 Neb. 777, 792, 906 N.W.2d 1, 13 (2018). A trial court's ruling on a discovery sanction will not be disturbed on appeal absent an abuse of discretion. *Id.* The determination of the appropriate sanction is to be considered in the factual context of the particular case. *Id.* When determining what sanction is appropriate, a trial court should consider the explanation for the failure to comply, the importance of the expert's testimony, the surprise to the opposing party, any time needed to prepare to meet the testimony from the expert, and the possibility of a continuance. *Id.*

The exclusion of evidence for the "failure to abide by the rules of discovery result[ing] in the other party's detriment . . . is not mandatory." *Brown v. Hansen*, 1 Neb. App. 962, 970, 510 N.W.2d 473, 478 (1993). Indeed, the Nebraska Supreme Court has found no error when a trial court refused to exclude an unlisted expert witness or his report when the complaining counsel had been aware of the identity of the witness and the contents of the report prior to the start of trial. *See Nixon v. Harkins*, 220 Neb. 286, 289, 369 N.W.2d 625, 628 (1985). In this case, Dr. McNeese's affidavit, which included his report, had been in the hands of the complaining counsel for seven months prior to the first day of trial. (106:3-6; E26) Appellant had ample time to familiarize herself with its contents and its conclusions before trial and in the five months between the first day of

trial when Dr. McNeese was called to testify and the last day of trial. While Appellant claims she was not prepared to cross-examine Dr. McNeese at trial, Appellant failed to ask for a continuance to prepare for the testimony of Dr. McNeese. [103:18-23]. Instead, Appellant did not move to strike Dr. McNeese's testimony and, in fact, cross-examined Dr. McNeese and, on the third day of trial, cross-examined Mr. Moore about the report and Dr. McNeese's evaluation. (115:12-116:9; 117:21-118:6; 344:2-345:2). After having had the opportunity to remedy the alleged surprise and failing to take it, Appellant cannot now be heard to complain of it. *See Brown v. Hansen*, 1 Neb. App. at 973, 510 N.W.2d at 479. Furthermore, in light of the importance of Dr. McNeese's testimony and report to address any concerns for the children's and Appellant's safety in determining Mr. Moore's parenting time, the trial court did not abuse its discretion by allowing him to testify or admitting Exhibit 26 into evidence.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DIVIDING THE MARITAL ESTATE.

Appellant contends that the trial court abused its discretion by adopting Mr. Moore's proposed division of assets and, specifically, in finding that $5,800 of Mr. Moore's inheritance was dissipated. (Brief for Appellant, p. 47-48) At trial, it was undisputed that Mr. Moore received an inheritance of $11,321.72 that was deposited into the parties' joint bank account on February 7, 2017. (122:20-123:10; 233:4-234:22; E16) Mr. Moore testified to and produced documentation showing that $5,800 of the funds deposited into that account were diverted into Appellant's personal account for the express purpose of being applied to Appellant's outstanding medical bills relating to her tubal ligation surgery. (233:4-234:22; 235:17-18; E17) The transfers took place on February 7, 8, and 21 in 2017. (E17) After receiving the funds, Appellant did not use the funds to pay her outstanding medical debt. Instead, she spent the money at twenty-two (22) different eating establishments, nail salons, hair salons, assorted ATM cash withdrawals, and various retail

establishments such as: Kohls, Best Buy, Amazon, Famous Footwear, Sally Beauty, and Auto Sounds of Lincoln. (E17) Accordingly, the District Court did not abuse its discretion by concluding the Appellant dissipated $5,800.00 provided to her for medical bills.

In accepting Mr. Moore's proposed division of the marital estate, the trial court noted that Appellant's evidence of the parties' marital debts double-counted several expenses and included evidence of a NetCredit loan that was not produced in discovery. (T53) Despite this, Mr. Moore's updated "Division of Assets and Debts" spreadsheet included the NetCredit loan in an attempt to accurately portray the marital estate. (E43; 406:20-407:24) The trial court exercised its discretion in equity by including the $5,800 of dissipated assets and the undisclosed NetCredit loan in the marital estate, and did not abuse its discretion.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS ORDER OF CHILD SUPPPORT.

Appellant assigns error to the trial court's calculating child support by (1) "utilizing prior employment to determine [Appellant]'s earning capacity in light of evidence that suggests she we will never be able to earn that sum in the near future", and (2) by adopting a calculation worksheet with errors. (Brief for Appellant, p. 42)

A. The District Court Did Not Abuse Its Discretion in Holding Appellant to Her Previous Earning Capacity When Appellant Voluntarily Left Employment and Could Reasonably be Expected to Realize Such Earning Capacity.

Under the Nebraska Child Support Guidelines, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as employment and earnings history, education, occupational skills, and job opportunities. *See* Neb. Ct. R. § 4 -204(E). And, "earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where evidence is presented that the parent is capable of

realizing such capacity through reasonable effort." *Claborn v. Claborn*, 267 Neb. 201, 208–09, 673 N.W.2d 533, 540–41 (2004).

In this case, Appellant testified at trial that she had been unemployed for over eight months and, after filing this dissolution action, had voluntarily left her employment, where she had received over $58,000 per year in income, health insurance benefits, and a retirement account, because it was "stressful." (13:11-23; 129:2-3,14-20) However, Appellant could not name any of the places she had applied to and been rejected from. (14:12-15) The trial court correctly determined that a child support calculation based on Appellant's monthly unemployment benefit income would be inequitable and held her to her previous earning capacity. (T50)

B. The Child Support Calculation Adopted by the District Court was Supported by the Evidence at Trial.

Appellant claims there were two inaccuracies in the child support calculation adopted by the trial court: (1) attributing a gross monthly income of $4,977.74 instead of $4,833.33 to Appellant, and (2) including a deduction for Mr. Moore's health insurance that was not supported by the evidence. To the contrary, the child support calculation was clearly supported by the evidence at trial.

The District Court adopted Mr. Moore's proposed child support calculation which was based on the paychecks Appellant received through her previous employment. (E10; E14; T50) The evidence presented established that Appellant was receiving $2,297.42 in gross earnings per pay period, and was paid on a biweekly basis. (E10) As demonstrated by the equation below, this equates to Appellant receiving a gross income of $4,977.74 per month.

$$\frac{\$2,297.42 \times 26 \text{ pay periods in a year}}{12 \text{ months in a year}} = \$4,977.74 \text{ per month}$$

Appellant's contention that Mr. Moore failed to elicit testimony or documentation of his health insurance premium is also not supported by the record. First, Mr. Moore offered an exhibit of his monthly expenses, which included his cost for health insurance and dental insurance for him and his children at $517.00 per month. (E12) Second, while Mr. Moore did not have any recent paystubs to submit, Mr. Moore testified to earning approximately $1648 each paycheck on a biweekly basis and netting approximately $852.73 after health insurance and child support. (285:22-286:8) Mr. Moore has $530.50 withheld from each paycheck for child support which means $264.77 per paycheck was applied to his health insurance premiums. (398:12-15; E11) It is true that the health insurance premiums shown in Mr. Moore's 2018 paystubs do not match this figure; however, Mr. Moore's testimony is sufficient to evidence the increase in these premiums and verify the information in the proposed child support calculation. (289:1-16; E14)

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING APPELLANT IN CONTEMPT.

Appellant contends that the trial court abused its discretion in finding that she had willfully and contumaciously violated the previous court orders awarding Mr. Moore telephonic parenting time. (Brief for Appellant, p. 37)

The trial court entered several orders addressing Mr. Moore's telephonic parenting time, three of which were entered specifically to address the no contact order and allow for Facetime parenting time. (T13,43,65-67) However, Appellant admitted she had not facilitated any telephonic or Facetime parenting time for Mr. Moore since August 2018. (169:19-170:7) Appellant claimed that she could not facilitate the Facetime parenting time because of the no contact order entered in August 2018, that she took it to "mean no contact, no contact period." (172:10-14) At the same time, Appellant also testified to thinking she could be present during a Facetime parenting time

session between Mr. Moore and their children, and in fact being present during one despite the no contact order. (172:15-175:10)

Appellant's motivations in selectively choosing when she could and could not facilitate Facetime parenting became clear when she was asked on cross about the trial court further modifying its order to specify that she could facilitate Mr. Moore's Facetime parenting time:

> Q Do you have any objection to this Court ordering that contact be allowed to facilitate parenting time between Mr. Moore and your two daughters?
>
> A Absolutely, until he does what he needs to be doing on probation, and seek --- do something therapeutically, as the recommendation has been for two years.
>
> Q You understand that he has been ordered to have telephonic parenting time since November of --
>
> A I understand ---
>
> Q -- last year and --
>
> A -- he's been ordered to have tele- -- to have therapeutic visits …
>
> . . .
>
> Q Do you understand that he has been ordered to have telephonic parenting time on Tuesdays and Thursdays, 6:30 p.m.?
>
> A Yes. I understand the recommendation is therapeutic. (205:9-207:3)

Appellant was fixated on the recommendation of Mr. Keady that there by therapeutic parenting time and refused to allow anything but therapeutic parenting time. When asked on cross what her proposed parenting plan would be (since she did not offer one as required by the Nebraska Parenting Act), Appellant responded "Therapeutic visitation." (151:23-24) The trial court correctly interpreted Appellant's actions by finding that she intentionally disregarded the court's orders awarding parenting time and appropriately held her in contempt for the same. (371:7; T49)

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR ATTORNEY FEES.

Appellant contends that the trial court abused its discretion in denying her request for attorney fees. (Brief for Appellant, p. 50) At trial, Appellant offered evidence that she incurred $5,525.00 in attorney's fees. (E35) Mr. Moore offered evidence that he had incurred $28,047.92 in attorney's fees, and that a significant portion was incurred from Appellant's undue delay and game play and additional discovery needed after trial to find out about the untimely disclosed NetCredit loan. (312:13-313:1; 408:8-409:9; E27; E44) Considering the circumstances of this case, the trial court did not abuse its discretion in declining to award attorney fees related to the dissolution action and awarding modest fees associated with the contempt action.

It has been held that in awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Garza v. Garza*, 288 Neb. 213, 220, 846 N.W.2d 626, 633 (2014). If anything, these factors militate in favor of awarding some fees to Mr. Moore, given that (i) Mr. Moore prevailed on the majority of the contested issues, including parenting time, Parenting Plan, child support, Appellant's contempt, and the division of the marital estate; (ii) the services actually performed by Mr. Moore's counsel were substantial, as the case was pending for almost two years and was unnecessarily complicated by Appellant's refusal to allow any parenting time for Mr. Moore that was not therapeutic and requiring Mr. Moore to bring multiple motions for parenting time and a contempt action to enforce his rights of visitation; (iii) the case presented fact-intensive issues regarding the children's best interests and the appropriate valuation of the marital estate; and (iv)

Mr. Moore's fees were reasonable and customary. Accordingly, it cannot be said that the trial court erred in denying Appellant's request for attorney fees.

CONCLUSION

For the foregoing reasons, Michael Moore, Jr. respectfully requests that this Court affirm the District Court's Decree of Dissolution in its entirety, and award him attorney's fees in connection with this appeal.

DATED this 10 of April, 2020.

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4833-8083-8329, v. 1

Certificate of Service

I hereby certify that on Friday, April 10, 2020 I provided a true and correct copy of this *Brief of Appellee Moore* to the following:

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